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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 594

BEN PEARSON, CARL B. HAUN AND J. T. HAUN,
doing business as BEN PEARSON COMPANY
Petitioners and Appellants Below

v.

L. METCALF WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR ..... *Respondent and Appellee Below*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. W. DICKEY
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PARAGON PRINTING CO., LITTLE ROCK

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PETITION

TO THE HONORABLE HARLAN F. STONE,
Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of the Matter Involved

Petitioners produce goods for interstate commerce, and are within the Fair Labor Standards Act of 1938, Title 29, U.S.C.A., paragraphs 201 to 219, inclusive. The ques-

tion is whether they are within the scope of a Wage Order made applicable to the Lumber and Timber Products Industry which became effective November 3, 1941. They manufacture and sell bows and arrows and 35 different articles of archery equipment consisting in part of arm guards, finger tabs, arrow pouches, bow strings, targets, scuffing instruments, fletching tools, etc. Wood is used as a constituent part in only three of the 37 articles manufactured and sold by petitioners (R. 33). Petitioners purchase arrow shafts of wood which are already cut into the desired shapes and lengths by the seller (R. 41). The wood shafts are lacquered, nocks which contain grooves for the bow strings are glued on one end, and points are glued on the other. Colored stripes are painted on the arrows. If need be, they are straightened. Feathers are purchased in large quantities, sorted, trimmed, and glued on the arrows. The gluing of the feathers on the arrow is called fletching. The feathers must be precisely applied if the arrow is to fly on a straight line (R. 11-13).

The arrow shafts cost one cent each. The feather, point, nock and other materials added to the arrow shaft cost three cents. The work of converting arrow shafts into finished arrows is performed almost entirely by women. They are untrained when first employed. They start at a wage of 30 cents per hour which is gradually increased. At the end of a year's service they are paid 35 cents per hour (R. 40).

Most bows are made from wood purchased from some lumber manufacturer which is already cut into pieces approximately six feet long. These pieces of wood are smoothed, placed in soda to remove oils, and are then taken out and sanded down to the right shape. A leather handle riser is glued to the middle (R. 21). The bows are then

sent to the Finishing Department. Here they are dipped into a vat of sand and sealer and racked. While racked they are varnished by use of a spray gun. They are then placed in a bow handle turning machine, and as they rotate glue is applied to the handle and a leather band is wrapped around the handle. The leather on the handle is then covered with cellulose tape. Strings are then placed on the bow. The strings are made of linen cord. Strands are twisted together by small motors and an adhesive material is added. A machine measures the tension of the bow string (R. 13). The spray gun used for painting is operated by boys. The other work done in the finishing of a bow is performed by women (R. 13). Like those who finish arrows, they start at 30 cents per hour and the rate is gradually increased to 35 cents per hour (R. 40). The cost of the wood which is used in making bows is less than the cost of the other materials (R. 57).

Only 7 per cent of the employees of petitioners cut wood with saws or shapers. Only 7 per cent of the employees of petitioners operate sanding machines. Only the bows are shaped, cut or sanded. No reworking of arrows is necessary. The 14 per cent who do wood work of any kind are paid wages ranging from 35 to 85 cents per hour (R. 57). The other 86 per cent of the employees of appellants paint, lacquer, fletch, wrap handles, cut feathers, glue points and nocks, add bow strings, and make 34 articles of archery equipment which are woodless.

Petitioners had never supposed that they were part of the Lumber and Timber Products Industry. They always regarded themselves as "sporting goods manufacturers". That is the way they are classified by insurers

who rate them for compensation insurance (R. 49). There are ten bow and arrow manufacturing plants in the United States (R. 57). That is a substantial and a definable group.

On May 17, 1941, the Administrator of the Wage and Hour Division of the Department of Labor, pursuant to the provisions of 29 U.S.C.A. 208 (a), and by Administrative Order No. 109, formed Industry Committee No. 30 for the Lumber and Timber Products Industry. In the Order forming the committee he defined the Lumber and Timber Products Industry as follows:

> "Wood saw milling and surfacing; wood reworking, including but without limitation kiln or air drying and the manufacture of planing mill products, dimension stock, boxes and wood turnings and shapings; the manufacture of specialized timber products including but without limitation shingles, cooperage stock, veneer, plywood, and veneer packaging; provided, however, that the term does not include cooperage or the manufacture of cigar boxes, cork products, reed and rattan products except vegetable and fruit baskets, or furniture and furniture parts as defined in Administrative Order No. 108" (R. 94-95).

The Committee met, heard testimony, and recommended a minimum wage of 35 cents per hour for all industries within the definition. The definition was never altered in the course of the deliberations of the Industry Committee. The Committee's recommendation was filed with the Administrator. Using the same definition he published notice of the hearing to be held before him in the Federal Register, as required by the provisions of 29 U.S.C.A. 208 (g). At such hearing he decided to approve the recommendation. Wage Order No. 30 was promulgated and made effective as of November 3, 1941 (R. 105). The

Wage Order was again published in the Federal Register, the definition being the same.

More than six months after Wage Order No. 30 became effective the Administrator notified the petitioners that under his interpretation they were within the scope of the Wage Order and demanded that they comply with its provisions (R. 46).

Petitioners declined to comply with the Wage Order because they were not "defined" therein, as required by 29 U. S. C. A. 208 (f). The Administrator sued the petitioners in the District Court asking for a mandatory injunction to compel compliance with the provisions of the Order. The District Court granted the relief prayed. Petitioners appealed to the United States Circuit Court of Appeals Eighth Circuit, and the decree was affirmed (R. 117).

II

Reasons Relied on for the Allowance of the Writ

The United States Circuit Court of Appeals, Eighth Circuit, has decided an important question of Federal law which has not been, but should be, settled by this Court. That question is the meaning of the word "define" as used in 29 U.S.C.A. 208 (f). If that word means that the Administrator shall describe industries to be included within a Wage Order with such certainty as will enable a citizen of ordinary intelligence to know that the particular industry with which he is connected is included, then the judgment of the United States Circuit Court of Appeals should be reversed. That Court, in effect, holds that the definition need not be subjected to such a test.

Wherefore, your petitioners pray that a Writ of Certiorari issued under the seal of this Court be directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the records and proceedings of the said court had in the case numbered and entitled on its docket No. 12584, Civil, Ben Pearson, Carl B. Haun and J. T. Haun, doing business as Ben Pearson Company, appellants, v. L. Metcalf Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 28th day of December, 1943.

BEN PEARSON, CARL B. HAUN AND J. T. HAUN,
doing business as BEN PEARSON COMPANY

By J. W. DICKEY
HENDRIX ROWELL
A. F. HOUSE

Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is not officially reported, but may be found at page 108 of the Record.

II

Jurisdiction

1. The date of the judgment to be reviewed is November 10, 1943 (R. 117).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended. 28 U.S.C.A. 347.

III

Statement of the Case

The statement set forth in the preceding Petition is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The Court erred in giving to the word "define", as used in 29 U.S.C.A. 208 (f), an interpretation which

allows an administrative officer functioning under delegated powers to formulate a vague definition for use in a wage order and then expand its scope by interpretation.

2. The lower court erred in holding that Wage Order No. 30 defined the industry in which petitioners are engaged.

V

Summary of Argument

Point A: The power conferred on the Administrator to initiate proceedings to raise the minimum wage rates must be exercised in strict conformity with the provisions of the Act.

Point B: The definition as contained in Wage Order No. 30 does not include the petitioners.

POINT A

Delegated Power

The Congress prescribed the general minimum wage rates. 29 U.S.C.A. 206. It provided for the appointment of the Administrator of the Wage and Hour Division of the Department of Labor (id. 204). The Administrator is authorized to initiate proceedings whereby the minimum wage rate for any particular industry or group of industries may be increased above the general minimum rate. He defines the industry or industries and appoints an Industry Committee. Its membership must include representatives of employers and employees within the industry or industries and representatives of the public. The Administrator convenes the Industry Committee and re-

fers to it questions as to whether the existing wage rate should be increased with respect to that particular industry or industries (id. 208). The Administrator is directed to supply the Committee with pertinent data and to bring before it witnesses so as to familiarize the Committee with the conditions within the industry or industries (id. 205). The Committee files a report containing its recommendations "after due notice to interested parties and giving them an opportunity to be heard". The Administrator may carry the recommended wage rate into effect (id. 208 (d)).

It is left to the Administrator to formulate a definition of the industry or industries and to initiate proceedings, but the Congress, in safeguarding the interests of those to be affected, inserted the following provisions:

> "(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.
>
> "(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administor deems reasonably calculated to give general notice to interested persons" (29 U.S.C.A. 208 f and g).

In the case of *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, this Court sustained this delegation of powers to the Administrator, but it was pointed out that such delegation of powers was valid because the Congress had defined the circumstances under which the Administrator and the Committee could function. From the opinion:

> "* * * The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance in the constitutional sense, of the legislative function" (p. 144).

One of the circumstances defined by the Congress was that the Administrator himself should "define the industries * * * to which they are to apply" (29 U.S.C.A. 208 f).

An agency exercising delegated powers "must pursue the procedure and rules enjoined, showing a substantial compliance therewith to give validity to its action". See *Wichita R. R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48.

Before any industry can be bound by a wage order, it must be shown that the Administrator pursued the procedure and rules enjoined and complied substantially with the provisions of the Act which required him to "define" the industries to be affected. The idea that the definition to be used in a wage order must be precise and not one which can be expanded by interpretation finds support in the *Opp* case. There it was stated that the definition as formulated by the Administrator might be amended during the deliberations of the Committee, but that it was imperative that the recommendation of the Committee and the Order of the Administrator be based on "the same definition". If the Committee uses a definition which

would not suggest the inclusion of bow and arrow manufacturers as a part of the Lumber and Timber Products Industry, then the Administrator is to be denied the power to bring bow and arrow manufacturers in by interpretation. Otherwise there would be a variation in the definition as used by the Committee and as used by the Administrator in the enforcement of the Wage Order.

The Circuit Court of Appeals found a similarity between Wage Orders and Legislative Acts, saying that the former are "governed by the same rules of interpretation and construction" (R. 112). It seems to us that the analogy is misplaced. The Congress has commanded that the Administrator "define the industries to be included in a Wage Order." That is a condition precedent. To indulge in construction and interpretation in search for the Administrator's intention, as is done with respect to Legislative Acts, would nullify both the Congressional mandate and its purpose. It would produce "administrative action beyond or contrary to the legislative will". See dissenting opinion of Mr. Justice Reed in the case of *Switchmen's Union of North America* v. *National Mediation Board,* decided November 22, 1943.

POINT B

The Definition of the Lumber and Timber Products Industry Does Not Include Petitioners

In the trial court the Administrator contended that petitioners were within the definition because they manufactured "wood turnings and shapings" and "specialized timber products". In the United States Circuit Court of Appeals the first contention was abandoned and the Administrator rested his case entirely on the contention that

petitioners are manufacturers of "specialized timber products". Therefore only that portion of the definition is relevant. It reads as follows:

> The manufacture of specialized timber products, including, but without limitation: { Shingles; Cooperage stock; Veneer; Plywood and Veneer packaging

The five products mentioned are "timber products" and are so regarded by all within that industry. All of the five named products involve logging, sawmill operations, and the sale of the products as they come from the mills. No one is a by-product. In all, the logs are cut, transported and milled for the sole purpose of producing those particular products. That is shown by the witnesses who testified before the Industry Committee (R. 84-94). Approximately twenty witnesses appeared before the Committee, submitted data, and discussed the advisability of an increase in the minimum rate for members of the Lumber and Timber Products Industry. Not a word was spoken with reference to the problems of bow and arrow manufacturers or sporting goods manufacturers or concerning their special methods of operation, or the characteristics of their products. As might be anticipated, the discussions, with one exception, were limited to the problems and the methods of manufacturers who were clearly within the definition. The one exception was the witness Emil Kekich, a representative of the Match Industry, and he appeared at the suggestion of some representative of the Wage and Hour Division (R. 93).

No one would think of bows and arrows as coming within the category of "specialized timber products". To speak of a "timber product" is to suggest logging, sawing,

and mill production of material which is to be used for building purposes. See the definition of "timber" as contained in *Webster's New International Dictionary, Second Edition.* An entirely different concept is formed when reference is made to bows and arrows. One naturally would think of the manufacture of bows and arrows along with the manufacture of tennis rackets, golf sticks and the like as "sporting goods manufacturers". The latter do not operate mills or function primarily in the production of timber products for the use of others. Sporting goods manufacturers purchase the wood which they use from those who are within the Lumber and Timber Products Industry, and then a few of their employees shape these timber products thus purchased so that other employees may transform them, along with other materials, into articles which are distinctive and far removed from the concept of a timber product.

These manufacturers call themselves "sporting goods manufacturers", and they are so classified by insurers who provide workmen's compensation insurance for them. The rates which they pay are much less than the rates paid by typical members of the Lumber and Timber Products Industry (R. 49). That is due, of course, to the fact that such a small proportion of the employees are engaged in the operation of woodworking machines. 86 per cent of the petitioners' employees do nothing but ornament, add materials, and do the precision work which makes the articles function accurately in the practice of archery.

In *Webster's New International Dictionary, 2d Edition*, the word "define" is defined as follows:

> "To state explicitly after judging carefully; to fix, decide or prescribe clearly and with authority;

"To mark the limits of; to determine with precision; to state clearly the boundaries of;

"To set apart in a class by identifying marks; to characterize; to distinguish."

Judge Johnsen, in writing the opinion for the lower court, said:

"Here, as in the general testing of any legislative remedial act, it is reasonable and practicable certainty and not legalistic preciseness that is the sound criterion in definition" (R. 113).

That deviates somewhat from the dictionary meaning, but that is immaterial for the definition in question does not meet the test of "reasonable and practicable certainty". The only words of the definition which are said to include petitioners are the following:

"The manufacture of specialized timber products."

Never before had the petitioners been called manufacturers of "timber" products. How would they know they were supposed to be included if it was the first time they were ever classed along with shingle mills, etc., as manufacturers of specialized "timber" products? There is no similarity whatever in their methods of operation or in the character of their products. There can be no "practicable certainty" in any definition which for the first time calls a sporting goods manufacturer a manufacturer of "timber" products. Judge Johnsen also said:

"* * * this does not mean that Congress intended to compel the Administrator to enumerate in his definition every specific product which the order was designed to cover. Such an attempted enumeration, as the Administrator points out in his brief, would cer-

tainly be a most difficult if not an impossible task" (R. 112).

Of course, the Administrator would not be expected to enumerate specific products. That would call for a definition having the expanse of a Sears-Roebuck catalogue. It would take thirty-seven listings just to include the products of petitioners. It is regrettable that the Circuit Court of Appeals was impressed by such an argument. It is demonstrably fallacious. The Administrator says now that bow and arrow manufacturers are included because wood is a component part of their products. It would have been easy for him to have conveyed that idea in the definition if at the time it was formulated he intended to include those whose products contained wood as a component part. It would only have been necessary for him to have included the following phrase:

"The manufacture of any product which contains wood."

That would have put all whose products contain wood on notice. That would have informed petitioners and others that the proceedings involved them. The administrator had no difficulty in formulating definitions for other Wage Orders which clearly and succinctly expressed the component part idea. In formulating a definition for the Converted Paper Products Industry, he used this language:

> "The manufacture of all products which have as a basic component pulp paper or board," etc. (Published Federal Register, September 22, 1942.)

His definition for the Leather Industry contained this:

> "The manufacture of welding and power transmission belting when made wholly or principally of leather." (Published Federal Register, May 15, 1940.)

And for the Rubber Industry the definition included the following:

> "The manufacture of all products which have as an ingredient any form of natural rubber, including latex, reclaimed rubber," etc. (Published Federal Register, April 5, 1941.)

Distinctions as to predominant use could also be plainly stated as was done in the definition of the Jewelry Industry. Parts for the listed articles of jewelry were included, but with this proviso:

> "The term, parts, as used in the foregoing paragraph does not include parts which are used predominantly for products other than jewelry such as springs, blades and nail files," etc. (Published Federal Register, May 30, 1941.)

It is evident that he had no idea of including all whose products contained wood. If he had such an idea, so easily to be expressed, then he would have expressed it. There are still other factors which demonstrate that he had no such idea; that he has brought the petitioners in by interpretation; and that he is straining the phrase "manufacture of specialized timber products".

After preparing the definition which was supposed to define the industries affected, but without any intention of altering it, he submitted to the Committee a document entitled "Minimum Wages in the Lumber and Timber Products Industry, Prepared by Research and Statistics Branch of the United States Department of Labor, Wage

and Hour Division, in June, 1941" (R. 67 and 82). In this document he gave the Committee his interpretation of his own definition. Nowhere is there the faintest suggestion that he construed it as including manufacturers of bows and arrows, tennis rackets, golf sticks and the like.

He told the Committee that the definition covered "excelsior and matches, burial cases or wood shipping boxes of caskets, coffins and other morticians' goods" (R. 68-69). But in the next paragraph he stated that "caskets and coffins" were excluded "because of their peculiar and special nature" (R. 70-71). In other words, he told the Committee that the manufacturers of wooden boxes in which caskets are shipped were included, but that manufacturers of coffins were excluded. His reason for making a distinction is apparent. The shipping box is made of wood, a few nails, and two hinges. As to both value and volume it is predominantly of wood. A coffin is of more complicated structure. It consist of wood, velvet, satin, padding, glass, paint, metallic handles, etc. In volume the wood preponderates, but the added materials have taken away all identity as a "timber" product. Coffins, says the Administrator, do not classify as timber products "because of their peculiar and special nature". It is clear that he has gone into the field of interpretation and is considering extrinsic factors. If he interprets his definition as not including a coffin because of its peculiar and special nature, then how can he include bows and arrows? The process of their manufacture and the variety and cost of the other materials which are added make them just as peculiar and special as are coffins. Logically he cannot interpret his definition as excluding coffins without also excluding bows and arrows.

In his communications he also told the Committee that a manufacturer of venetian blinds was not included (B. 71). The slats, however, which are used in the manufacture of venetian blinds are included (R. 84). The slats are timber products. They are mill-manufactured, like arrow shafts and the wood used for bows. The manufacturing of the slats is a part of the lumber and timber products industry. To make a venetian blind the manufacturer purchases slats from a slat manufacturer just as a bow manufacturer purchases the wood which is to be used in making a bow. The slats are trimmed to size just as the bow wood is trimmed. Holes are bored in both ends for threading the cord just as the ends of the bow are grooved for the bow strings. Tape is applied to hold the slats in place just as tape is applied to hold the handle riser on the bow in place. Metal fittings are attached which, with the cord, control the operation of the blinds just as the bow string is added which transmits the momentum to the arrow. The manufacturer who trims the slats, combines them with cord, tape and metal fittings is not included because venetian blinds are "unrelated in their manufacturing process to the products covered." Logically the Administrator cannot draw any distinction between a manufacturer of venetian blinds and a manufacturer of bows and arrows. Wood is used in the products of both, but neither naturally falls within the category of "timber products."

Had the Administrator used a definition containing the component part idea, then obviously it would have included both coffins and venetian blinds. He did not desire to include them, and that accounts for the fact that he failed to use definitions embracing the component part idea as he had done in other Wage Orders.

The Administrator also told the members of the Committee that the definition included:

Blackboards and blackboard erasers,
Wood novelties and specialties,
Dry and polishing mops,
Bobbins and spools,
Dowell pins,
Mop sticks,
Shoe lasts,
Woodenware bowls,
Woodenware dishes,
Pastry boards,
Clothes pins,
Ironing boards,
Clothes racks,
Wash boards,
Wooden beads.

Then he followed with the comment that the definition did not include "cigar boxes, specialties made of paper, metal, *wood and combination of materials*" (Emphasis supplied) (R. 71). If the inclusion of bobbins, spools, mops, etc., which were predominantly of wood, both as to value and volume, would convey to the average mind the inference that bows and arrows were also included, then certainly they would be puzzled by the further comment that the definition did not include specialties made of wood and a combination of materials, as it cannot be denied that bows and arrows are combinations of wood and other materials.

CONCLUSION

These interpretations given by the Administrator to the Committee during its deliberations would seem to be improper unless the official definition were at the same time amended. Otherwise there would come from the Committee the recommendation of a Wage Order for the industries defined in the official definition as interpreted by the Administrator, and then only the uninterpreted official definition would be published in the Federal Register. An interested party would have to study the official definition and then pursue the inquiry further and read the communications passing from the Administrator to the Committee in order to determine whether his particular industry would be affected. However, the interpretations which he gave to the definition in this instance do not harm petitioners. On the contrary, they would logically indicate that petitioners are excluded.

If the Administrator feels that manufacturers of bows and arrows should be included, then he may easily amend the definition and reconvene the Committee. The Committee, if it sees fit, may make the wage rate applicable to the petitioners and other bow and arrow manufacturers, but the petitioners will have had an opportunity to present their proof and arguments as to why they should not be included, or why they should be classified from within which is permissible under the Act.

This procedure may prove slightly inconvenient to the Administrator, but his inconvenience can scarcely be

weighed against the right of a citizen to have fair notice of any proceeding which may jeopardize the future of the business from which he earns his livelihood.

Respectfully submitted,

BEN PEARSON, CARL B. HAUN AND J. T. HAUN,
doing business as BEN PEARSON COMPANY

By J. W. DICKEY
HENDRIX ROWELL
A. F. HOUSE

Counsel for Petitioners

No. 594

In the Supreme Court of the United States

October Term, 1943

BEN PEARSON, CARL B. [illegible] AND [illegible]
DOING BUSINESS AS BEN PEARSON
PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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BEN PEARSON, CARL B. HAUN AND J. T. HAUN, DOING BUSINESS AS BEN PEARSON COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court issued no written opinion. Its "Findings of Fact and Conclusions of Law" appear in the record (R. 54–57). The opinion of the Circuit Court of Appeals is reported in 138 F. (2d) 655 (R. 107–117).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 10, 1943 (R. 117). The

petition for a writ of certiorari was filed on January 11, 1944. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the manufacture of bows and arrows by petitioners is subject to the Wage Order for the Lumber and Timber Products Industry issued by the Administrator of the Wage and Hour Division.

STATUTE INVOLVED

The statutory provisions involved are Sections 3 (h), 6 (a) (4), 8 and 10 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, *et seq.* The pertinent portions of these provisions are set forth in the appendix.

STATEMENT

This action was instituted by the Administrator to enjoin petitioners from violating the Fair Labor Standards Act by failing to pay a substantial number of their employees in accordance with the provisions of the Lumber and Timber Products Wage Order issued by the former Administrator, Philip B. Fleming (Title 29, c. V, Code of Federal Regulations, part 610) (R. 5–8).

This wage order, establishing the minimum wage rate of 35 cents an hour for employees in the Lumber and Timber Products Industry subject to the Act, went into effect on November

3, 1941, almost six months after proceedings looking to its promulgation had been instituted. These proceedings included a public hearing on June 23, 24, and 25, 1941, before a tripartite industry committee (R. 82–94), and a formal hearing before the Administrator on August 5, 1941, on whether or not the committee's recommendation for a 35-cent hourly minimum wage rate should be approved (R. 6). The wage order was accompanied by findings of the Administrator, including a specific finding that the definition of the industry was appropriate and reasonable (R. 101), and by a 51–page opinion setting forth the reasons for the Administrator's decision (R. 98–105). Notices of the hearings and of the promulgation of the wage order were published in the Federal Register and widely circulated among trade organizations and in the trade and general press. These notices set forth the definition of the Lumber and Timber Products Industry, which specifically included "the manufacture of specialized timber products" (R. 7) and "all occupations in the industry which are necessary to the production of products covered in the definition" (R. 7–8).

Petitioners are engaged in the production, sale, and distribution of bows, arrows, targets, and miscellaneous items of archery equipment (R. 10). In the manufacture of bows, rough pieces of wood are sawed and shaped in petitioners' wood work-

ing department until they are reduced to the appropriate size (R. 18–19). They are then sanded by a pneumatic drum and thus prepared for the finishing department (R. 19). In the finishing department the bows are dipped in a vat of sanding sealer, sprayed with varnish and strung (R. 13). A leather handle is also glued to the bow (R. 13). In the manufacture of arrows, shafts about 30 inches long are purchased (R. 23). Before they reach the finishing department, two operations are performed on the arrow shafts. One end is tenoned or trimmed down so that a plastic point may be superimposed and the other end is shaped to receive a plastic nock, the device that holds the string. (R. 23.) In the finishing department the arrow is lacquered, the plastic point and nock are affixed, stripes are painted on by machine, and feathers are attached (R. 24–27).

The District Court found that the bows and arrows manufactured by petitioners were made of wood and that the various operations performed in the finishing department were functions necessary to the production of the completed bows and arrows (R. 55). It concluded that petitioners' employees who were engaged in the production and shipping of bows and arrows were subject to the Lumber and Timber Products Wage Order (R. 55), and granted the injunction prayed for (R. 57–59). The Circuit Court of Appeals affirmed (R. 117).

ARGUMENT

1. The ground for the allowance of the writ relied on by petitioners is that the court below incorrectly interpreted the word "define" in Section 8 (f) of the Act as not requiring the Administrator to "describe industries to be included within a Wage Order with such certainty as will enable a citizen of ordinary intelligence to know that the particular industry with which he is connected is included" (Pet. p. 5). This assertion is plainly in conflict with the language of the opinion below. After posing the question, "is the definition sufficiently specific, so that the notice based thereon * * * could fairly and reasonably be expected to advise appellants and other manufacturers of bows and arrows that they were in all reasonable certainty within the compass of the proceedings being had and of the final order made," the court below concluded that "the Administrator's definition, by its inclusion of 'the manufacture of specialized timber products' was reasonably sufficient for this purpose" (R. 110–111),[1] and that consequently petitioners were

[1] The exact wording of the definition is as follows:

"*Wood saw milling and surfacing; wood reworking*, including but without limitation kiln or air drying, and the manufacture of planing mill products, dimension stock, boxes, and wood turnings and shapings; and *the manufacture of specialized timber products* including but without limitation shingles, cooperage stock, veneer, plywood, and veneer packaging; provided, however, that the term does not include

afforded a fair legal opportunity to appear in the proceedings and to seek to have their product excluded or specially classified, and if unsuccessful, to pursue the exclusive method of review of wage orders provided by Section 10 (a) of the Act.

As far as the structure of definitions under Section 8 (f) of the Act is concerned, the Administrator's power to further the broad remedial purposes of the Act by establishing broad industry classifications in general definitions has been recognized by this Court in *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 149–150, as well as by lower Federal courts. See *Art Metal Works* v. *Walling*, 129 F. (2d) 50 (App. D. C.); *Southern Garment Mfrs. Assn.* v. *Fleming*, 122 F. (2d) 622, 629, 630 (App. D. C.); *Walling* v. *Cohen*, 7 Wage Hour Rep. 117 (C. C. A. 3, 1944); *Walling* v. *Belikoff*, 7 Wage Hour Rep. 126 (S. D. N. Y., 1944). Petitioners agree that Congress could not have intended to compel the Administrator to enumerate in his definition every specific product to which the order is intended to apply (Pet. p. 15) and they apparently have no quarrel with the

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cooperage or the manufacture of cigar boxes, cork products, reed and rattan products except vegetable and fruit baskets, or furniture and furniture parts as defined in Administrative Order No. 108.

"The manufacture of any products covered under this definition shall be deemed to begin with the unloading of the raw material at the mill site." [Italics supplied.]

court's holding that, in formulating a definition for wage order purposes, the Administrator is only required to outline with reasonable clarity and certainty the general limits or extent of the industry sought to be covered.

Even by petitioner's own standards, therefore, it is clear that the court below made no error in its construction of the applicable statutory provisions.

2. Petitioners' real objection seems to be to the lower court's factual interpretation of the definition as applying with reasonable clarity and certainty to the manufacture of bows and arrows. The court held that since, as shown by the record, wood clearly remains the predominant part of finished bows and arrows, these products are reasonably and by sound implication within the broad category of "specialized timber products" (R. 113). There is nothing in the wage order or in the record of the proceedings leading to its promulgation which would indicate that the words "specialized timber products" were used in a narrow or technical sense. On the contrary, the broad scope of the definition was recognized by other members of the industry, including those engaged in production of such specialized timber articles as excelsior and matches (R. 85–86, 89, 91–92), and was clearly indicated in the Findings and Opinion of the Administrator (R. 100) and in the "Report on Minimum Wages in the Lumber and Timber Products Industry, Prepared by Re-

search and Statistics Branch, United States Department of Labor, Wage and Hour Division, in June 1941," which was part of the record before the industry committee (R. 66–82). This report, as well as the Administrator's opinion, specifically mentions, by way of illustration, the inclusion within the industry definition of numerous types of products requiring no less complicated finishing processes and no less specialized in use than bows and arrows (R. 70, 75). The fact that the manufacture of certain products was, for reasons of administrative convenience, excluded from the industry subject to the wage order, far from supporting petitioners' contention, is a further indication that all products having wood as their principal component are included unless specifically excepted.[2]

The conclusion that the definition of the Lumber and Timber Products Industry includes with reasonable clarity and certainty the manufacture of bows and arrows is thus extremely well founded. In any event, since this question involves primarily interpretation of simple language in the light of the facts of this particular case, it does not merit review by this Court.

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[2] For example, "the definition excludes a number of products which * * * employ wood only as a component of minor importance (cigar boxes and other specialties made from paper, metal, wood and other materials in combination)." Findings and Opinion of the Administrator (R. 100).

CONCLUSION

The decision below is correct. There is no conflict. We do not believe further review is required and accordingly we oppose the issuance of the writ.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, *et seq.:*

SEC. 3. As used in this Act—

* * * * *

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

* * * * *

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the

production of goods for commerce in such industry or classifications therein.

* * * * *

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations.

* * * * *

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply. * * * No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

* * * * *

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may

obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator * * *.

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